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Supreme Court of the United States

OCTOBER TERM, 1956

NO. 57

JAMES EARL BYRD, *Petitioner,*

Versus

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

WESLEY M. WALKER,
Greenville, S. C.
RAY R. WILLIAMS,
Greenville, S. C.
Counsel for Respondent

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OPINIONS BELOW

The District Court filed no opinion. The opinion of the Court of Appeals is not yet reported but is printed in full in the petitioner's appendix to the Petition for a Writ of Certiorari. (pp. 19-35).

JURISDICTION

The Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C., Section 1254.

We respectfully submit that the jurisdiction of this Court should not be invoked for the reasons hereinafter set forth.

QUESTIONS PRESENTED

The Respondent will reply to the questions as phrased and presented by Petitioner.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment VII.

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

28 *U. S. C.* 2106.

> "The Supreme Court or any other Court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Title 72, *Workmen's Compensation, Code of Laws of South Carolina*, 1952.

> "Sec. 72-101. When Acceptance of Provisions Presumed.
>
> "Every employer and employee, except as stated in this chapter, shall be presumed to have accepted the provisions of this Title respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment and shall be bound thereby, unless he shall have given, prior to any accident resulting in injury or death, no-

tice to the contrary in the manner provided in Section 72-105.

"Sec. 72-111. Liability of Owner to Workmen of Subcontractor.

"When any person, in this section and Sections 72-113 and 72-114 referred to as 'owner,' undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and Sections 72-113 to 72-116 referred to as 'subcontractor') for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him."

"Sec. 72-114. Construction When Proceedings are Against Owner or Contractor.

"When compensation is claimed from or proceedings are taken against an owner or contractor, then, in the application of this Title, reference to the owner or contractor shall be substituted for reference to the subcontractor, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the subcontractor by whom he is immediately employed."

"Sec. 72-121. Employee's Rights Under Title Exclude All Others Against Employer.

"The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death."

"Sec. 72-123. Only One Remedy Available.

"Either the acceptance of an award under this Title or the procurement and collection of a judgment in an action at law shall be a bar to proceeding further with the alternate remedy."

1952 *Code of Laws for South Carolina,* Chapter 15, Rural Electric Cooperative Act.

"Sec. 12-1021. For What Purpose Organized.

"Cooperative non-profit membership corporations may be organized under this chapter for the purpose of supplying electric energy and promoting and extending the use thereof in rural areas."

"Sec. 12-1025. Powers of Cooperative.

"In addition to the powers conferred on all private corporations by Sec. 12-101 a cooperative shall have power:

"(5) To construct, purchase, take, receive, lease as lessee or otherwise acquire, to own, hold, use, equip, maintain, and operate to sell, assign, transfer, convey, exchange, lease as lessor, mortgage, pledge or otherwise dispose of or encumber electric transmission and distribution lines or systems, electric generating plants, electric refrigeration plants, lands, buildings, structures, dams, plants and equipment and any and all kinds and classes of real or personal property whatsoever which shall be deemed necessary, convenient or appropriate to accomplish the purpose for which the cooperative is organized;

"(8) To construct, maintain and operate electric transmission and distribution lines along, upon, under and across all public thoroughfares, including, without limitation of the generality of the foregoing, all roads, highways, streets, alleys, bridges and causeways, and upon, under and across all publicly owned lands, subject, however, to the requirements in respect to the use of such thoroughfares and lands that are imposed by the respective authorities having jurisdiction thereof upon corporations construction or operating electric transmissions and distribution lines or systems;

"(10) To conduct its business and exercise any or all of its powers within or without this State; and

"(11) To do and perform any and all other acts and things and to have and exercise any and all other powers which may be necessary, convenient or appropriate to accomplish the purpose for which the cooperative is organized."

STATEMENT OF CASE

This action was brought by Petitioner to recover damages for personal injuries against Respondent, a South Carolina Corporation organized and operating under the provisions of the *Rural Electric Co-operative Act of South Carolina*, as set forth in Chapter 15 of Volume I of the *Code of Laws of South Carolina*, 1952 (Sections 12-1001, et seq.) The Petitioner was an employee of a contractor engaged in doing certain construction work for Respondent pursuant to a written contract.

On motion of Respondent, the suit was dismissed by Honorable C. C. Wyche, United States District Judge, 118 F. Supp. 868, on the ground that Respondent was not subject to liability for tort under the law of South Carolina. The judgment of the District Court was reversed by the Court of Appeals and the case remanded for further proceedings, 215 F. (2d) 542. Certiorari was denied by the Supreme Court on January 10, 1955, 348 U. S. 915.

In its original Answer, Respondent set up as a defense that Petitioner had been compensated for his injuries under the South Carolina Workmen's Compensation Law. Petitioner moved to strike the defense and on October 6, 1955 Respondent noticed a motion to amend the allegations in its Answer with respect to the defense under the Workmen's Compensation Act. These motions were heard on November 5, 1955 and by Order dated November 11, 1955, Petitioner's motion was denied and Respondent's motion was granted.

On the trial, testimony and evidence supporting the issue made by the affirmative defense under the Workmen's Compensation Act was offered by A. J. Hurt, Respondent's Manager and E. V. McMahon, the Chief Engineer on the work being done under the contract, along with other witnesses and documentary evidence. This testimony of Respondent was not disputed, the basic defense being that Petitioner's recovery was limited to the benefits provided by the *Workmen's Compensation Act of the State of South Carolina*, Title 72 of the *South Carolina Code of* 1952. That statute provides that when an owner undertakes to execute any work which is a part of his trade or business and contracts with any other person for the

execution of the whole or any part thereof, the owner shall be liable to pay to any workman employed in the work any compensation under the Act which he would have been liable to pay if the workman had been immediately employed by him. (Section 72-111)

On trial at the close of Respondent's testimony, Petitioner moved to strike the defense or for the direction of a verdict thereon. At this point and prior to deciding the motion, contrary to a statement in the Petition, the District Judge queried Petitioner's counsel as to any reply testimony the Petitioner might have to offer and warned of the prospect of a motion by Respondent for the direction of a verdict. Petitioner's motion was granted. Thereupon, Respondent was allowed an exception to the Court's ruling and made a motion for the direction of a verdict on grounds expressly including the issue made by the said affirmative defense. The District Judge stating that the motion might be made to cover and include the subject issue.

The Court overruled Respondent's motion and upon a verdict being returned for Petitioner, Respondent thereafter moved for judgment notwithstanding the verdict upon grounds including the said defense and such motion was likewise overruled.

In the District Court, both Petitioner and Respondent took the position that, whether the work being done in the construction of facilities for Respondent was a part of its trade and business within the meaning of the *South Carolina Workmen's Compensation Act*, was a question of law for the Court. Each took the same position before the Court of Appeals. The present and different position of Petitioner was taken for the first time in his Petition for a rehearing to the Court of Appeals.

ARGUMENT

REASONS FOR REFUSING THE WRIT

1. *The Court Of Appeals Has The Power To Reverse The District Judge In His Granting Of A Motion And To Direct Entry Of Judgment Against Party Making Such Motion To Dismiss An Affirmative Defense While Simultaneously Electing Not To Offer Reply Testimony*: The Petitioner contends that his action in the District Court in moving to strike one of Respondent's affirmative defenses at the conclusion of its testimony and in electing not to offer reply testimony thereto, if he had any, divested the Court of Appeals of the power to reverse the judgment of the District Court and to direct entry of judgment for Respondent on the defense it had alleged and established in bar of the Petitioner's action.

The Petitioner elected to make the motion to strike and when to make it. Surely, if he had testimony to offer on the issue raised by the defense, he could and should have offered such evidence before making the motion. Evidently Petitioner had no favorable testimony to offer. It was apparent to Petitioner that Respondent would make a motion for the direction of a verdict on grounds including the subject affirmative defense under the South Carolina Workmen's Compensation Act. The District Judge queried Petitioner's counsel on the matter of reply testimony and warned them as to the prospect of Respondent's motion for a directed verdict, stating it was a question of law, there being no conflict in the testimony. The answer given the Court by Petitioner's counsel is revealing and these developments occurred prior to the granting of the motion to strike. (R. 354, 355; Respondent's Appendix p. 19-20)

Here the case was tried by the District Court with opportunity afforded the litigants to produce all available evidence, to cross-examine witnesses and to exercise all other privileges and rights enjoyed in a trial. We submit that the power and authority of the Court of Appeals was clear to reverse the District Court and order judgment for the Defendant, Respondent herein, under the provisions of 28 *U. S. C.* 2106; 28 *U. S. C. A.* 2106; under which statute for the first time the power of the

Supreme Court and the Court of Appeals to enter judgment when remanding a case to the lower Court is set out in identical language in a single section. *Bryan v. U. S.*, 70 S. Ct. 317; 338 U. S. 552.

2. *There Was No Invasion Of The Province Of The Jury Contrary To The Seventh Amendment To The United States' Constitution In The Action Of The Court Below And The Procedure Was Consistent With Applicable Federal Procedure:* The motion made by Petitioner was at the conclusion of all the testimony in the case. It must be considered in the light of a motion for a directed verdict on the particular defense to which the motion was directed. The Respondent also made a motion for a directed verdict on grounds of this same defense. (R. 359-360; Respondents Appendix p. 20-21). The District Judge expressly held the issue to be a question of law, there being no conflict in the testimony. Such a request by each party for a final ruling in his favor is equivalent to a joint request for a finding of fact by the Court and the decision is conclusive. *Williams v. Vreeland*, 244 Fed. 346; 156 C. C. A. 632, affirmed 38 S. Ct. 438; 250 U. S. 295.

It is a familiar doctrine that where each of the parties to an action request the District Court to instruct a verdict, it would be assumed that both parties affirmed that there was no disputed fact question which would control the question of law involved. *Walsh Const. Co. v. United States Guarantee Co.*, 76 F. 2d 240, (C. A. 8) Certiorari denied, 56 S. Ct. 120, 296 U. S. 605; *National Bank of South Carolina of Sumter v. American Surety Co. of New York*, 67 F. 2d 131 (C. A. 4). Also, it has been consistently held that the action of both sides in moving at the conclusion of the evidence for directed verdict constituted waiver of jury trial. *Positype Corporation of America v. Flowers*, 36 F. 2d 617, Certiorari denied 50 S. Ct. 461, 281 U. S. 762; *Cudahy Packing Co. v. City of Omaha*, 24 F. 2d 3, Certiorari denied 49 S. Ct. 9, 278 U. S. 601.

It is significant that in his brief in the Court below, the Petitioner contended "Trial Judge was correct in withdrawing issue of application of Sections 72-111 and 72-121 of the *South Carolina Workmen's Compensation Act* as a bar to Appellee's

(Petitioner) action and concluding *as a matter of law* that these sections of the Act did not apply to the facts in the instant case as a bar to Appellee's action." The very issue upon which Petitioner now claims he is entitled to a determination by jury was withdrawn from the jury in the District Court upon his own motion and he made the claim of the right for the first time in his Petition for Rehearing in the Court below. The District Judge held the question to be one of law without a dispute as to the facts and the Respondent moved for a directed verdict upon the same issue. Subsequently, and in due time, the Respondent moved upon the same ground for judgment in favor of the Defendant notwithstanding the verdict. The appeal to the Court of Appeals was from the refusal of Respondent's motion for judgment notwithstanding the verdict and included this same ground.

In his Petition, Petitioner has made and repeated so many unfounded statements with respect to the testimony touching the issue involved, that we feel justified in asking the Court's indulgence here to quote from the opinion of the Court below in its summation of relevant facts on the issue relating to the *South Carolina Workmen's Compensation Law* and the work being done constituting a part of the trade and business of Respondent. (Petitioner's Appendix pp 24-26):

> "The uncontradicted evidence as to the construction work done by the employees of Blue Ridge may be summarized as follows: It maintains an outside crew of 8 linemen and 8 groundmen, one-third of whose time is spent in maintenance and two-thirds in construction work. It constantly builds new lines to new consumer members and builds extensions, some short and some long, up to eight miles in length; but since the end of World War II so many persons in rural areas have demanded electrical service that it has employed independent contractors to do a large part of the construction work, while continuing to do a considerable part through its own men. All of the construction work, whether done by itself or by outside contractors, is done under the supervision of the Southern Engineering Company, an independent organization conducted by engineers, which is employed

by Blue Ridge to make sure that the system complies with the requirements of the Rural Electrification Administration of the United States.

"The testimony with respect to the construction of the substations of Blue Ridge, stated most favorably to the appellee, discloses that originally Blue Ridge built three sub-stations with its own facilities, but that all of the sub-stations which were built after the war, including the six it was operating at the time of the accident, were constructed for it by independent contractors, and that at the time of the accident it had no one in its direct employ capable of handling the technical detail of sub-station construction.

"There can be no doubt that all of the work covered by the Bouligny contract was of the class which Blue Ridge was empowered by its charter to perform and that all of it was necessary to enable it to serve the growing needs of the rural communities. Furthermore, the main actor in the whole enterprise was the Cooperative itself. This is seen the more clearly when we round out, by way of illustration, the whole picture of what was done in the formation and performance of the Bouligny contract. The project was begun when Blue Ridge secured a loan of $334,300.00 from the United States under the Rural Electrification Act of 1934, as amended, to finance the construction work above described, the lines to be located along such routes as the owner with the approval of the Administrator should designate. Blue Ridge then entered into an engineering service contract with the Southern Engineering Company, whereby the Engineer agreed to render the engineering services necessary for the design and construction of the project. This contract provided for the preparation of plans and specifications by the Engineer, the approval thereof by the owner, the selection of a contractor by competitive bidding, the staking of the project by the Engineer after the procuring of rights of way and easements by the owner, and the supervision by the Engineer of all the details of the construction work as the representative of the owner.

"The construction contract with Bouligny conformed to the requirements of the loan agreement. It defined the Engineer as one employed by the owner with the approval of the Administrator to supervise the

construction of the project; it authorized the owner, acting through the Engineer with the approval of the Administrator from time to time to make changes in the plans and specifications; it subjected the manner of construction and all materials and equipment used therein, to the inspection and approval of the Engineer, and it required the contractor to maintain an office for the Engineer on the site to facilitate the work of supervision. The contractor agreed to furnish the materials according to the specifications at agreed prices; but the contract showed that the materials of which the sub-stations were to be constructed were purchased by the Cooperative. The Cooperative assumed the responsibility and agreed to perform the service of de-energizing and re-energizing existing lines during the progress of the work.

"From this description there can be no doubt that Blue Ridge was not only in the business of supplying electricity to rural communities, but also in the business of constructing the lines and sub-stations necessary for the distribution of the product, if these words are given their ordinary significance. The appellee says, however, that in the meaning of the compensation statute, construction work is not a part of an owner's business, unless it is of such a character that ordinarily it would be performed by his own employees; and reliance is placed on the evidence that since the war Blue Ridge has sublet the construction of sub-stations to outside contractors, and the line work performed by its own employees has been limited in extent. We do not think this interpretation of the statute is tenable. It will be noticed in the first place that 72-111 makes specific provision for the performance by a contractor of work which is part of the owner's business and in such case imposes upon the owner the same liability to pay compensation to the contractor's workmen as if they were immediately employed by him. In other words, the statute recognizes the practice of letting out to others the actual performance of one's business and subjects the owner to liability for compensation to injured workers. The manifest purpose is to afford the benefits of compensation to the men who are exposed to the risks of its business, and to place the burden of paying compensation upon the organizer of the enterprise. In conse-

quence, both the owner and the contractors whom he engages to do his work, are subjected to the requirements of the Act, and the workers receive double protection."

In this brief we do not propose to enter upon an argument with Petitioner as to facts and weight of the evidence. However, we do not wish the attack upon Mr. A. J. Hurt, Respondent's manager, to go unchallenged. The same unwarranted and unfounded charges are made against Mr. Hurt in the Petition herein which were made in the Court of Appeals. On the trial the testimony supporting the affirmative defense in question was offered by the said A. J. Hurt, E. V. Mahon, the Chief Engineer on the job, the deposition of Ira Moss, the contract between R. H. Bouligny, Inc., a construction company, and Respondent, and other supporting evidence. As heretofore stated, the evidence was not disputed and it was so held by the trial Judge. The only reasonable conclusion to be drawn from the evidence was that the work performed under the contract was clearly done in carrying on the trade and business of the Respondent Cooperative.

3. *The Action Of The Court Below Was In Conformity With Applicable State Law*: The Respondent was incorporated pursuant to a special statute of the South Carolina Legislature (1952 *Code of Laws for South Carolina*, Chapter 15, Rural Electric Cooperative Act) and Section 12-1025 expressly provides for Respondent to undertake and perform the exact type of work that was being done when Petitioner sustained his injury. Under the written contract in evidence, the contractor was constructing and converting lines and building substations and such work falls directly under the powers of the Respondent as prescribed in the statute. The making of the contract and the performance of the work thereunder constituted substantial evidence that Respondent was exercising the powers which it was authorized by special statute to perform. Thus, it necessarily followed that Petitioner was injured while engaged in an operation which entered directly into and became a part of the business of the Respondent for whom the work was being done. *Doane et al v. E. I. DuPont De Nemours & Co.*, (C. A. 4) 209 F. 2d 921.

It was conceded by Petitioner in the Court below that both Respondent (the owner) and Bouligny (the contractor) had complied with and were operating under the Workmen's Compensation Act, and that after the injury the Petitioner had elected to receive and had accepted full benefits thereunder from Bouligny; and it was also conceded that if the work being done at the time of the injury constituted a part of the business of the Respondent Cooperative, the present suit must fail. (R. 11-12; Respondent's Appendix p. 21). Thus the Petitioner admitted into the record all requirements of this defense except one, to-wit: that the work being done by the contractor constituted a part of the trade, business and occupation of the owner, the Respondent in this case.

At the conclusion of Petitioner's testimony in the District Court, the Respondent moved for a directed verdit or involuntary dismissal and at that time, the District Judge ruled that only one question was left open after Petitioner's admissions, that being, "whether claimant was injured while engaged in an operation which entered directly into and became a part of the business of the person for whom the work was being done?" (Appellant's Appendix in Court below, p. 31) *Doane, et al v. E. I. DuPont De Nemours & Co.*, supra.

It is well established that the leading case and recognized authority on this issue in South Carolina is the case of *Marchbanks v. Duke Power Co., et al*, 190 S. C. 336, 2 S. E. 2d 825, which was very similar to the present case. The decisions of the Supreme Court of South Carolina are in accord with the decision of the Court below in the present case. The following cases substantially support the position of Respondent and the decision of the Court of Appeals in the present case. ***Boseman v. Pacific Mills, et al,*** 193 S. C. 479, 8 S. E. 2d 878; ***Berry v. Atlantic Greyhound Lines, Inc.*** (C. A. 4), 114 F. 2d 255, 30 F. Supp. 188; ***Purkable v. Greenland Oil Co.***, 122 K. 720, 253 Pac. 219; ***Smith et al v. Fulmer et al,*** 198 S. C. 91, 15 S. E. 2d 681; ***Fox v. Fafnir Bearing Co., et al,*** 107 Conn. 189, 139 A. 778; ***Kennerly v. Ocmulgee Lumber Co.***, 206 S. C. 481, 34 S. E. 2d 792; ***Isthmian S. S. Co. of Delaware v. Olivieri, et al,*** C. A. 5) 202 F. 2d 492; ***McDowell v. Stilley Plywood Co., et al,***

210 S. C. 173, 41 S. E. 2d 872; *Hopkins v. Darlington Veneer Co., et al*, 208 S. C. 307, 38 S. E. 2d 4.

In the Court below the Petitioner relied upon *Sears Roebuck & Co. v. Wallace*, (C. A. 4) 172 F. 2d 802, a case involving the Virginia Compensation Statute, and the Court held that the work being done was not part of the business of the occupant and the occupant was not obliged to provide compensation for the employees of the sub-contractor, but was a stranger to the latter's business. We contend that the *Sears Roebuck & Co.* case was not analogous to the present case as the work being done by Petitioner was part of the trade and business of the Respondent and under no circumstances could Respondent be considered a stranger to the business or the work being done.

It is clear that the subject question was to be determined by the law of South Carolina. The well documented and well considered opinion of the Court below carefully follows the applicable principles of South Carolina law established in *Marchbanks v. Duke Power Co., et al*, supra, and subsequent decisions of the South Carolina Supreme Court cited above. In reply to petitioner's assertion as to deference of the Court of Appeals to the District Court on a question involving application of state law, we submit that the issue here involved was not uncertain and the established principles of law in South Carolina on the subject were eminently clear as was concluded by the Court of Appeals. When the issue here involved was before the District Judge, he stated for the record that he was not familiar with the South Carolina Workmen's Compensation Law and that, at his age, he did not care to attempt to acquaint himself with it. (R. p. 7; Respondent's Appendix, p. 21-22).

While in the District Court, the Petitioner conceded that he had no case if the work in which he was engaged when he was injured was part of the trade or business of Blue Ridge (Respondent), in the Court of Appeals the Petitioner contended for the first time, in the alternative, that even if the work was of this character, he was not precluded from bringing the present action because the contractor (Bouligny) paid the compensation awarded and hence the acceptance of the

award does not bar his suit under the provisions of Section 72-123 of the South Carolina Workmen's Compensation Act. The Court below considered the point after calling attention to the fact that the question was being raised for the first time. In support of this new contention, petitioner cited the case of *Ballard, Administratrix v. Southern Railway Co.*, (unreported, C. A. 5198, D. C. Eastern District of S. C.). The Court below held in accordance with the principles established in *State v. Benjamin F. Bennett Building Co.*, 154 Md. 159, 140 A. 52:

> • • • "The effect of this provision, when brought into operation through the designated state of circumstances, is to impose the absolute liability of an employer upon the principal contractor, when he was not in law the employer of the injured workman. The result then is that when the prescribed conditions exist, the principal contractor becomes by the act the statutory employer of any workman employed in the execution of the work.
>
> • • • "If an employer is within the act to bear its liabilities, he must remain to be accorded its immunities, in the absence of a clearly expressed legislative intention to the contrary."

In the opinion in *Marchbanks v. Duke Power Co.*, supra, the South Carolina Supreme Court discussed this question and, upon reaching the same conclusion said:

> "The best reasoned case that I have found on this question is that of *State v. Benjamin F. Bennett Building Co.*, 154 Md. 159, 140 A. 52, 53. It involves an act similar in principle to that of this State."

Thereafter, the South Carolina Supreme Court quoted extensively from the decision of the Maryland Court.

There can be no doubt but that the Court below was correct in ordering that the motion of the defendant in the District Court for a directed verdict in its favor should have been granted and, failing this, the subsequent motion for judgment non obstante veredicto should have been granted and, therefore, the judgment of the District Court was properly reversed with direction to enter judgment for the defendant.

CONCLUSION

Succinctly stated, the Petitioner seeks a review by this Court on questions involving (1) trial procedure and (2) South Carolina law. His position as to being deprived of a substantial right by reason of an election made by him at the end of the trial is totally without merit. We further submit that the decision of the Court below on the South Carolina law is eminently correct but, even if we assumed the decision to be error, this Court could not determine whether the Court of Appeals was right or not without making a determination on the record in the case and investigating South Carolina law. We respectfully submit that this honorable Court does not sit to correct an error in a case involving a local controversy under State law.

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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I, Miller C. Foster, Jr., Clerk of the United States District Court for the Western District of South Carolina, do hereby certify that I have examined the portions of the Transcript of Record herein printed in this Appendix and the same are true and correct.

Miller C. Foster

Clerk,
United States District Court
Western District of South Carolina

EXCERPTS FROM RECORD AT TIME OF PETITIONER'S MOTION AT CONCLUSION OF TESTIMONY

(Transcript of Record, pp. 354-355)

"*The Court*: In the event I overrule your motion, do you contemplate putting up any testimony in reply? You have that right, of course. On this point, I mean.

"*Mr. Hammer*: We haven't discussed it, but we are making that motion. I frankly don't know at this point of any reply that is necessary. I don't know of any evidence in this case . . .

"*The Court*: I am inclined to think so far it is a question of law but I will hear from Mr. Walker on that. I don't know of any issue of fact to submit to the jury. It seems to me under the testimony here there has been—I don't know of any conflict in the testimony, so far as that's concerned, so far.

"*Mr. Hammer*: I listened carefully to the last witness, and . . . .

"*The Court*: Do you agree with that, Mr. Walker, that that is a question of law?

"*Mr. Walker*: I think it is a question of law because there has been no evidence presented by the plaintiff to dispute the position.

"*The Court*: The reason I am making that inquiry as to whether you intend to put up any more testimony in the event I overrule your motion, counsel may wish to move for a directed verdict on that ground since it is a question of law. But that is his prerogative after all the evidence is in. Of course, he can't move for a directed verdict as long as you have a right to reply.

"*Mr. Hammer*: We are moving at this time in the nature of a voluntary dismissal.

"*The Court*: You move to dismiss the defense?

"*Mr. Hammer*: Yes, sir, at this stage of the game.

"*The Court*: What do you say, Mr. Walker?

"*Mr. Walker*: Your Honor please, we say that the evidence could not be more clear, that the de-

fendant co-op was in the business that is covered by this contract; that is, the work that was being performed."

(Transcript of Record, p. 359):

"*Mr. Walker*: We are necessarily confined to and referring to the types of construction being performed by Bouligny under the particular contract and we say that the defendant was engaged in the same types of construction that were provided for under that contract.

"*The Court*: I can't follow you on that. Anything else you have to say, gentlemen? I will have to grant the motion. I allow you an exception. Bring in the jury. (12:55 P. M., Jury returns to open Court.)

"*The Court*: Anything in reply?

"*Mr. Edens*: Nothing, your Honor."

RESPONDENT'S MOTION SUBSEQUENT TO GRANTING OF PETITIONER'S MOTION

(Transcript of Record, pp. 359-360)

"*The Court*: Since the testimony closed, do you have any motions, Mr. Walker?

"*Mr. Walker*: Yes, sir, I wish to make a motion for a directed verdict.

"*The Court*: I will allow you to include in that Motion for Directed Verdict your defense which I have stricken, if you desire. In other words, I will allow you to include a motion for directed verdict on the ground that all the testimony shows whatever you want to put in it. In other words, you can add to it, to reserve your rights. Of course, you could make it on the other. I will allow you to make it if you want to.

"*Mr. Walker*: Yes, sir, I do so desire to make a motion for directed verdict. First, for the record, I wish to include . . .

"*The Court*: The same grounds you made the motion for involuntary dismissal?

"*Mr. Walker*: All those grounds."

ADMISSIONS BY PETITIONER INTO RECORD WITH REGARD TO DEFENSE UNDER SOUTH CAROLINA WORKMEN'S COMPENSATION ACT

(Transcript of Record, pp. 11-12)

"*Mr. Hammer*: I will admit that the defendant elected to come under the Act.

"*Mr. Walker*: He admits we are operating under the Act.

"*Mr. Williams*: As I understand, it is admitted this, then: that both Blue Ridge and Bouligny elected to and came under Workmen's Compensation. That is admitted on the record.

"*The Court*: Right.

"*Mr. Williams*: The only other question left would be whether or not this was part and parcel of the business of Blue Ridge. In other words, was—the only question that would be left is: in the meaning of the Workmen's Compensation Act, was the plaintiff the employee of Blue Ridge Electric? That would be the only question left.

"*Mr. Hammer*: That's correct.

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"*Mr. Walker*: In the event that—let me state it this way: as I understand him, he is admitting that if this business that was being done by Bouligny, the independent contractor, constituted a part of the trade, business and occupation of Blue Ridge, then we have a complete defense?

"*The Court*: That's right.

"*Mr. Hammer*: That's correct."

STATEMENT BY DISTRICT JUDGE WITH REGARD TO DEFENSE OF RESPONDENT UNDER SOUTH CAROLINA WORKMEN'S COMPENSATION ACT

(Transcript of Record, p. 7)

"*Mr. Hammer*: The only thing that makes a difference is if he is an employee within the meaning of the Act, employee of the trade, business or profession of the defendant, if he is . . .

"*The Court*: He can prove that, can't he?

"*Mr. Hammer*: And that's as far as he's got to go to sustain his defense and if he doesn't sustain his defense . . .

"*The Court*: Let me see if I follow you, because I don't know anything about this Workmen's Compensation Law and don't want to learn except for this case. I don't know anything about it and I am not at my age trying to learn something about it."